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in the

Supreme Court

of the

United States

OCTOBER TERM, 1972

NO. 72-986

WESTERN VENTURES, INC.,
Petitioner,

vs.

DADE DRYDOCK CORPORATION,
Respondent.

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent adopts Petitioner's statement of the case and, in addition, states that nowhere in the trial court's findings of fact and conclusions of law (Petitioner's A. 1-6) does the trial court find that either the employee of the shipyard or the shipyard itself was guilty of a breach of its implied warranty of performing the services in a workmanlike manner.

ARGUMENT

Petitioner concludes his argument by stating he has been penalized "for a job well done." We wish to state at the outset that neither the Fifth Circuit nor the trial court penalized the petitioner "for a job well done." The petitioner's claim for indemnity was denied because there was no finding by the trial Court that the shipyard or the employee of the shipyard, who was the Plaintiff in the trial court, violated the implied warranty of performing the services in a workmanlike manner.

It is well settled in law, if where a shipowner is sued by an employee of a stevedoring company or a shipyard, whether the shipowner successfully defends the claim or not, he is entitled to recover his expenses of defending from the stevedoring company or the shipyard *only* where there has been a finding of fact that the injuries were the result of the stevedoring company or the shipyard's breach of the implied warranty to perform the services in a workmanlike manner.

The above statement is supported in *Damanti vs. A/S Inger*, 314 F.2d 395 (2nd Cir. 1963) where the Court stated:

> "The elements the ship must establish to recover indemnity from the stevedore, are first that the settlement was reasonable under all the circumstances and second, that the stevedore was guilty of a breach of the warranty of workmanlike service and has no defense against the ship's indemnity claim."

In *Denaro vs. United States*, 337 F.2d 275 (2nd Cir. 1964) in which the United States was the shipowner and Denaro, a shoreside worker, the Court stated:

> "The United States is not entitled to be indemnified by Denaro's employer, American Stevedores, Inc., for the legal expenses incurred in defending itself, for the District Judge found, with ample support in the record, that there was no breach of the warranty of workmanlike service."

In the case before the Court, the trial court and the Fifth Circuit denied petitioner's claim for indemnity because there was no finding in the trial court of a breach of the implied warranty to perform the services in a workmanlike manner. Petitioner admits on page 6 of his petition that this was the basis of the decision of the trial court and the Fifth Circuit. Petitioner alleges that such a decision is in direct conflict with the decision of the United States Court of Appeals for the Fourth Circuit in *American Export Lines vs. Norfolk Shipbuilding and Drydock Corp.*, 336 F.2d 525, 1965 A.M.C. 167 (Fourth Cir. 1964). That decision of the Fourth Circuit *is not* in conflict with the decision of the Fifth Circuit in the case presently before the Court. In the case in the Fourth Circuit, the jury found that the shipyard was solely responsible, therefore, the jury found as a fact that there had been a breach of the warranty of performing the services in a workmanlike manner by the shipyard and therefore, the shipowner was entitled to indemnity from the shipyard. Indemnity was allowed in that case and there was a finding of the breach of the implied warranty of workmanlike service which is consistent with the decision of the Fifth Circuit in holding that there must be a breach of that warranty before there can be indemnity.

Petitioner has also cited the case of *Hill vs. Flota Mercante Grancolumbiana S. A.*, 267 F.Supp. 380 (Ed., La. 1967), Aff'd 405 F.2d 878 (5th Cir. 1969), Cert. Denied 395 U.S. 934 (1969), in which the district judge held that both the shipowner and the employer were blameless but due to the unusual circumstances involved in that case, the economic costs of defending the main action should be borne by the employer because he was in a better position to have prevented the whole thing from the start. In that case, the Plaintiff was a stevedore who was an unusually large man and had injured himself while attempting to go through a hatch. The injury was, in part, due to the size of the man. The district judge rested his decision on the basis that the employer probably should not have hired such a large man for this type of work and therefore, the employer was in the best position to have prevented the whole thing from the start. Based on this reasoning, the district judge allowed the vessel owner to recover the cost of defense from the employer who had hired this unusually large stevedore.

It should be noted that none of these unusual facts of the *Hill* case, *supra*, pertain to the case now before the Court. There is absolutely nothing in the record of anything unusual about this Plaintiff's physical condition or size that had anything to do with this case. Therefore, the reasoning of the Judge in the *Hill* case cannot be applied in the case now before the Court and the case now before the Court should be decided on the well settled rule of law that where there is no breach of the warranty of workmanlike performance, there can be no indemnification.

It should also be noted that Petitioner indicates that the *Hill* case, *supra*, was affirmed by the Fifth Circuit. In

reviewing the decision of the Fifth Circuit, it is clear that the Fifth Circuit decision pertains only to the main action between Hill and the shipowner. The third party defendant did not appeal and the Fifth Circuit decision affirms only the decision of the main action.

Petitioner also argues that he should not be penalized for a successful defense. We wish to point out to the Court that when this case was actually tried in the trial Court, the Third Party Defendant, the shipyard, and its counsel were present at the counsel table and took an active part in the presentation of evidence, examination and cross-examination of the witnesses and played an active role in the trial. We would hope that our activity at the trial was to some degree partially responsible for the successful defense of the main action.

It is simply our position that petitioner is not entitled to recover his expenses because there was no finding by the trial court that the shipyard or the employee of the shipyard, who was the Plaintiff in the trial court, violated the implied warranty of performing the services in a workmanlike manner. There is not a single case cited by petitioner which disagrees with this statement of the law. In each appellate decision cited by petitioner, there was a finding that either the employee who was suing the shipowner or the employer of the employee, stevedore or shipyard, whichever was involved, was guilty of a breach of the implied warranty of workmanlike service and recovery was allowed for that reason.

In *Manning vs. M/V Sea Road*, 417 F.2d 603 (5th Cir. 1969), there was a manhole cover missing and in *Provenza*

vs. American Export Lines, Inc., 324 F.2d 660 (4th Cir. 1963), cert. denied, 376 U.S. 952 (1964), I beams were left loose on the deck when they should have been lashed.

The petition should be denied because petitioner has not cited a single appellate case in conflict with the decision of the Fifth Circuit in the case before the Court. It should be denied because this is not an important federal question which should be settled by this Court. All of the circuits allow indemnity only where there has been a breach of the implied warranty to perform the services in a workmanlike manner. Certainly, the decision of the Fifth Circuit does not call for exercise of this Court's power of supervision because the Fifth Circuit has simply denied indemnity where there was no showing of the breach of the implied warranty to perform the services in a workmanlike manner which is what is required.

CONCLUSION

For the foregoing reasons, respondent prays that this Court deny the petition for Writ of Certiorari.

Respectfully submitted,

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By JESSE W. MILLER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to SMATHERS & THOMPSON, Attorneys for Petitioner, 1301 Alfred I. duPont Building, Miami, Florida 33131, JOHN H. LEWIS, ESQ., Attorney for Plaintiff, 1008 Concord Building, Miami, Florida 33130, and RAYMOND GREENE, ESQ., Co-Counsel for Dade Drydock Corporation, 254 Security Trust Building, Miami, Florida 33131, this 2 day of February, 1973.

JESSE W. MILLER

By_____